PETITION NOT PRINTED

FILE COPY

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1958~~ 1959

No. ~~285~~ 52

ELIJAH McNEAL, JR., PETITIONER,

vs.

R. O. CULVER, AS STATE PRISON CUSTODIAN

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

PETITION FOR CERTIORARI FILED SEPTEMBER 14, 1959

CERTIORARI GRANTED MARCH 7, 1960

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[fol. 1] [File endorsement omitted]

IN THE SUPREME COURT OF FLORIDA AT TALLAHASSEE, FLORIDA

ELIJAH MCNEAL, JR., Petitioner,

vs.

R. O. CULVER as STATE PRISON CUSTODIAN, Respondent

To the Supreme Court:

PETITION FOR WRIT OF HABEAS CORPUS—Filed March 21, 1959

Comes now the petitioner Elijah McNeal Jr. alias Lige McNeal Jr. in his own proper person without counsel, and respectfully represents unto the Court as follows:

That he is and has been restrained and detained of his liberty without authority of law and he presents this petition under and by virtue of Section (7) Declaration of Rights, Constitution of the State of Florida.

That petitioner is imprisoned and detained upon a judgment of conviction found against him without regard to his Federal Rights under the 14th Amendment to the Constitution of the United States, and in violation to the Constitution of Florida and in violation of the decisional rules and established law of Florida.

(1) The trial Court deprived him in his rights to representation by counsel as required by decisional rules and established law of Florida.

(2) The trial Court deprived him of a fair and impartial trial.

(3) The trial Court deprived him of "Due Process of Law".

(4) The trial Court deprived him of his Constitutional Rights under both State and Federal Constitutions.

(5) The trial Court deprived him of Due Notice by refusing to furnish him a copy of the Information.

[fol. 2] History of Case

Petitioner, shows he was informed against by the Hon. Clifton M. Kelly, County Solicitor of Polk County, Florida, and was tried on an Information charging Assault to Murder in the First Degree before the Honorable Roy H. Amidon, in the Criminal Court of Record, in and for Polk County, Florida, on February 26, 1958, the trial resulted in a conviction by a Jury of six, of the offence of Assault to Murder in the Second Degree.

Thereafter, on March 31, 1958, Judge Amidon imposed a sentence of twenty years, at hard labor in the Florida State Prison. The petitioner is a Negro age 30 and never before appeared in any court on a felony, and did not understand court procedure or know how to defend himself and establish his innocence. At the commencement of trial Judge Roy H. Amidon, asked the petitioner if he had an attorney, petitioner answered no. And requested the court to appoint some one to represent him. The Court answered if the charge was a capital offence, I would appoint you an attorney, but since this is not a capital offence you are not entitled to a court appointed attorney and you won't need a Lawyer in this case, and then informed your petitioner he would be allowed to question the witnesses and also informed me I could take the witness stand in my behalf, but I would be questioned and crossed examined by the County Solicitor. Petitioner asked the Court if he could have a copy of the Information and a list of the State witnesses, the Court said that would not be necessary as the Information would be read to him, and that I would see all the witnesses when they took the stand. Thereupon, the State picked a Jury of six, and the County Solicitor, read the Information and the trial [fol. 3] began. The Complaining witness was a Negro named Scurry, who testified your petitioner shot at point blank from a distance of fifteen feet with a shot gun but testified he Scurry, wasn't hit.

End of History

Questions Involved in This Petition

(1) The trial Court violated the petitioner's Constitutional rights both State and Federal, in denying the petitioner the organic Constitutional right to be furnished a copy of the Information entered against him.

(2) The trial Court violated the petitioner's Constitutional rights both State and Federal, by denying him the right to representation by court appointed counsel as required by decisional rules and established law, as laid down by the Florida Supreme Court, and as held by the United State Supreme Court.

Argument on Point (1)

Under Florida law, and Section II Declaration of Rights, Constitution of the State of Florida, and under the Constitution of the United States, is a man entitled to Due Notice by furnishing him a copy of the Information or Indictment when charged with a crime?

The Federal and State decisions are abundant with instances wherein it is consistently held that one, in the circumstances of your petitioner's situation was entitled as a matter of right to Notice of the charge against him, by furnishing him a copy of the Information.

The Due Process clause of the 14th Amendment to the United States Constitution required it, The Florida Bill of Rights, required it and Florida Statue 906.28 *Required it.*

Petitioner, relies on decisions of the United States Supreme Court, and decisions of the Supreme Court of Florida, [fol. 4] which specifically apply and control the instant situation.

The Florida Supreme Court in the case "House v. State, 130 Fla. 400; 177 So. 705; made the observation that:

"When construing the Constitution of the United States it is the duty of this Court to follow the Con-

stitution placed thereon by the Supreme Court of the United States".

Failure of the trial Judge to invoke the State Statute and Bill of Rights, (Florida Constitution) in these circumstances was a failure to invoke Due Process because, Florida Constitution and the statute in question, are such that they commit the Florida Courts to the doctrine laid down by the United States Supreme Court when interpreting similar rights under and by virtue of the Due Process Clause of the 14th, Amendment.

It is not difficult to define Federal due process, because the elements of which it is composed are clearly and definitely enumerated in the Bill of Rights. When on the other hand, one undertakes to define State due process, he finds himself faced with almost insuperable difficulties. Instead of dealing with a single unit of government possessing a written constitution in which the essential elements of due process are clearly stated, he must deal with forty-eight governments, each with its own constitution, set of statutes, and doctrines, of judicial interpretations. One might almost despair of finding any common element in the various definitions of due process, had not the presence of due process clause in the 14th Amendment brought a number of cases involving its interpretations before the United States Supreme Court. From these decisions, and from the various treaties on the subject, it is possible to discover certain elements which are essential to due process in any one of the forty-eight States, these are:

[fol. 5] (1) Due Notice.
(2) A Hearing.
(3) Hearing before a competent tribunal.
(4) A trial free from irregularities of procedure.
(5) Freedom from arbitrary legislative action.

The first three items rest upon the decision in "Twining v. New Jersey, 211 U.S. 78, which in turn rests in part on the decision in the earlier case of Den ex dem. Murray v. Hoboken Land and Improvement Company, 18 Howard 272. The remaining items are based on the writings of students of Constitutional Law. See Mott, Rodney L., Due Process of Law (Babbs-Merrill, Indianapolis 1926.) See also

"Burdick, Charles K., Law of the American Constitution (Putmames New York 1922), and Young, James T., The New American Government and its Work, Third Edition, Chapter 32 (Macmillan, New York, 1933), And on the subject of notice and hearing, see Mott. op. cit. chapter 13.

A reading of the above cited authorities and authorities that will be cited later in this brief, it will be seen the United States Supreme Court has held the right to due notice, or the right to be furnished a copy of the Information, when charged with crime, is an indispensable part of Due Process of Law, itself as required by Federal Law under the 14th, Amendment. and required under the Florida Constitution. See House v. Mayo, 63 Fed. Supp. 169.

The Supreme Court of Florida has consistently held that the trial Courts of Florida, must conduct the trial of defendants in such a way as not to deprive them of Due Process. It is also a burden on all trial judges to protect [fol. 6] the Constitutional Rights of defendant's that appear before them.

In support of the above petitioner cites a long line of cases. See:

"Wood v. State of Florida, 19 So. 2nd 872-876;
"Christie v. State, 94 Fla. 469, 114 So. 450;
"House v. Mayo, 324 U.S. 42, 65 Sup. Ct. 517;
"Hawk v. Olson, 326 U.S. 271, 66 Sup. Ct. 116;
"Messer v. State, 120 Fla. 95, 162 So. 146;
"House v. State, 130 Fla. 400, 177 So. 705;
"Deeb v. State, 131 Fla. 362, 179 So. 894;
"Scott v. State, 101 Fla. 250, 134 So. 50;
"Ziegler v. State, 95 Fla. 108, 116 So. 241;

The question in this petition is basic and fundamental under American Law. Neither the facts nor the record are in dispute. Due Process, Fairness and Right, and the American way, demand that the petitioner be given due notice, State Statutes, such as the one here involved, were designed and enacted not only to clarify due process, but to control the local habits of procedure, so as to bend them into line with the rules laid down by the appellate Courts. Such State laws are but more civilized refinements of the constitutional law. They have but one end in view, i.e. to protect accused persons in situations identical to the petitioner's trial Court predicament. Failure of the trial

Judge to apply the State Statute was a failure to invoke the constitutional safeguard and the judgment and imprisonment predicated on such a failure is void.

It has become well settled throughout all jurisdictions of this country; in all our State Courts of last resort; and in the United States Supreme Court, that convictions for alleged criminal offenses, when they have been arrived at via detours from the legitimate highway of constitutional construction; when there foundation is laid in judicial pro-[fol. 7] cedures which lacked the essential rudiments of American Justice-Fairness and Right-, they are without the validity necessary to lawful enforcement; they are convictions found in violation of Due Process of Law, and as such are contrary to and in violation of the 14th, Amendment to the United States Constitution. Such convictions have been universally held to be not merely voidable, but are void from the-r inception.

Some further consideration of this right is found in the case of Lee v. State 155 So. 123:

> "When the State places a person accused of crime upon trial where life or liberty is involved, it can never consistent with its dignity, as the sovereign power, its sense of justice to its citizens, and its obligations to preserve its tribunals absolutely free from all suspicion of smartness and trickery and unfair advantage, deny to the accused every legal right he has to a fair and impartial trial. He has a constitutional right to a trial by due course of law, and to the administration of right and justice without sale, denial or delay. He may demand the nature and cause of the accusation against him, to meet the witnesses face to face, and be furnished a copy of the indictment."

Can this Honorable Court say section II of the Declaration of Rights of the Florida Constitution, and the Fourteenth Amendment of the Constitution of the United States was complied with.

To permit a man's freedom to be forfeited upon such illegal procedure of trial without notice would make of the constitutional requirement of Due Process of Law, a meaningless symbol.

When the light of the Constitution is thrown upon the facts in the case, and where it is clear that action of the

trial Judge violates terms of the State and Federal Constitutions, it is the obligation of this Honorable Court so to declare.

The actions of State Courts and of judicial officers in their official capacities is to be regarded as action of the State within the Fourteenth Amendment. State action in viola- [fol. 8] tion of the Fourteenth Amendment, is equally repugnant to the Constitutional commands whether directed by State statute or taken by a judicial official in absence of statute. The action of State courts in imposing penalties or depriving parties of other substantive rights without providing adequate notice and opportunity to defend is a denial of Due Process of Law, guaranteed by the Fourteenth Amendment. State action within the Fourteenth Amendment refers to exertions of State power in all forms and when the effect of that action is to deny rights subject to protection of the Fourteenth Amendment, it is the obligation of this Honorable Court to enforce the Constitutional commands of the Fourteenth Amendment.

Due Process of Law, preserved for all by our constitution, commands that no such practice as that disclosed by this petition shall send any accused to prison. No higher duty, no more solemn responsibility rests upon this Honorable Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution.

In view of the requirement of section II of the Declaration of Rights of the Florida Constitution, which says a defendant can demand the nature and cause of the accusation against him . . ." *And shall be Furnished with a Copy of The Indictment against him."*

And on the authority of the United States Supreme Court in "Twining v. New Jersey, 211 U.S. 78. where the Court held the right to Due Notice or, *to be furnished a copy of the Information was an indispensable part of Due Process of Law.*

[fol. 9] Argument on Question (2)

It has been shown the petitioner was a Negro man and never before appeared in court on a felony and therefore, did not know how to defend himself. Both State and Fed-

eral Constitutions, says it would be a violation of Due Process of Law to put to trial a man on a criminal offense without counsel when it is shown he is incapable of representing himself adequately.

The complaining witness in this case testified the petitioner shot at him point blank from a distant of 15 feet with a shot gun. But yet he that witness was not hit. This court knows there is something wrong with that testimony, as it would be impossible to fire a shot gun at any one from 15 feet away and not hit him. If petitioner had been represented by counsel, there is a good chance he would have been able to establish through proper cross-examination that there was no assault made upon the witness only a discharge of a gun in a public place.

The high courts have consistantly held that a trial such as the one had by your petitioner is as no trial. This case, therefore, involves another of the many applications of the settled doctrine, summarized in the opening words of "Palmer v. Ashe, 342 U.S. 134, 135;

> "This court has repeatedly held that the Due Process clause of the Fourteenth Amendment requires States to afford defendants assistance of counsel in noncapital criminal cases when there are special circumstances showing that without a lawyer a defendant could not have an adequate and a fair trial."

One of the catalogues of such circumstances is that in [fol. 10] Uveges v. Pennsylvania, 335 U.S. 437, 441 where the United States Supreme Court said the counsel was required.

> "Where the gravity of the crime and other factors such as age and education of the defendant the conduct of the court or the prosecuting officials and the complicated nature of the offense charged and the possible defenses thereto—render criminal proceedings without counsel so apt to result in injustice as to be fundamentally unfair."

Petitioner stood trial. What happened illustrates the observation in "Gibbs v. Burke, 337 U.S. 773;

> "A defendant who pleads not guilty and elects to go to trial is usua-ly more in need of the assistance of a lawyer than one who pleads guilty." 337 U.S. at 381.

The most recent case dealing with the same questions raised in this petition is a Florida case. "Cash v. R. O. Culver, this Court denied Cash a Writ of Habeas Corpus, on the same grounds. Cash filed a Writ of Certiorari, before the United States Supreme Court, the Court granted Certiorari, and directed this Court to reconsider Cash's Writ, that case is before this Court now.

Petitioner, rests the case equally upon the complexity of the trial judgments petitioner had to make, "Rice v. Olson, 324 U.S. 786, Williams v. Kaiser, 323 U.S. 471; Vonmelke v Gillies, 332 U.S. 708, and on the failure of the trial judge to "guide a defendant without a lawyer past errors that make trials unfair," "Townsend v. Burke 334 U.S. 736;

The Florida Supreme Court has consistantly held the trial courts of Florida *must* appoint counsel for indigent defendants, when requested and it is shown the defendant is not capable of representing himself, and has consistantly held the trial court *must* inquire if the accused is repre- [fol. 11] sented by counsel if not it has been the practice to appoint some attorney to represent the accused. See:

"Zellers v. State, 189 So 236, 138 Fla. 458;

This Honorable Court said in Sneed v. Mayo, 66 So. 2d, 865;

> "From the above cited cases, and the State Federal decisions and Statues cited therein, certain principles seem clearly established. The court has no right to deprive the accused of the benefit of counsel in a criminal proceedings."

It has been shown the petitioner did not know court procedure, as he had never been in court before, therefore, it was a burden on the trail judge to inform him of his

Constitutional rights, and appoint counsel as is the practice in Florida, See "Sneed v. Mayo, supra. this court said.

> "It has been the general practice in trial courts of this state, when a person charged with a felony and brought to the bar for arraingnment, to inquire of the accused whether he had counsel to represent him, and if, upon inquiry, it developed that he had not an attorney and was unable to employ one, to ask the accused if he desired to be represented by counsel, that it has been the practice for trial judges to appoint some attorney to represent the accused. This practice is in accord with the letter and spirit of the Bill of Rights, and section 3969 of the General Statu-es of 1906—now section 909.21 Florida Statu-es 1951. FSA. . . . While the practice in this State has been as indicated above, still there is no law requiring it unless the accused is incapable of representing himself adequately at the trial on account of age, ignorance or lack of mental capacity."

Can a layman that has never been in court before adequately represent himself in a criminal trail?

The United States Supreme Court answered this question in Powell v. Alabama 287 U.S. 45; 53 S.C. 55-65; 77 L. Ed. 158; 84 A. LLR. 527; The Court said:

> "What, then, does a hearing include? Historically and in practice in our country at least, *it has always* [fol.12] *included the right to the aid of counsel when desired and provided by the party asserting the right.* The right to be heard would be, in many cases of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of eviden-e without a proper charge, and *convicted upon incompetent* evidence, or irrelevant to the issues or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one. He requires the guiding hand of

counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case civil or criminal, a state or federal court were arbitrar-ly to refuse to hear a party by counsel, employed by and appearing for him it reasonably may not be doubted that such a refusal would be a denial of a hearing, and therefore, of due process in the constitutional sence."

Further on the same opinion, the United States Supreme Court continues:

"In exparte Riggins (C.C.) 134 Fed. 404, 418, a case involving the Due Process clause of the Fourteenth Amendment, the Court said, by way of illustration, that if the state should deprive a person of the benifit of counsel, it would not be due process of law. Judge Cooley refers to the right of a person accused of crime to have counsel as perhaps his most important privilege, and after discussing the developement of the English Law on that subject, says: "With us it is a universal principle of shall be allowed a defense by counsel." (I Cooley, Const. Lim. 8th, Ed. 7 C.) The same author, as appears from a chapter which he added to his edition of story on the Constitution, regarding the right of the accused to the presence, advice and assistance of counsel as fundamantal in character. E. G. People v. Napthaly, 105 Cal. 641, 644, 39 Pac. 23; Cutts vs. State, of Florida 54 Fla. 21 23, 45 Sc. 491; Martin v. State, 51 Ga. 567, 568, I Am. Crim. Rep. 536; Sheppard v. State, 165 Ga. 460 464, 141 S.E. 196; State v. Moore, 61 Kan. 732, 734, 60 Pac. 748; State v. Ferris, La. Ann. 424;"

[fol. 13] In Messer v. State, 120 Fla. 95, 162 So. 146, the Florida Supreme Court said:

"The constitutional right of an accused to be heard by counsel is stated in language of emphasis that means just what it says. *It should* be respected in substance as

well as in form by the trial courts. The United States Supreme Court in Powell v. State of Alabama (supra) has gone so far as to hold that the constitutional right to be heard by counsel is an indispensable part of due process of law, itself as required by federal law under the 14th amendment. The right to be heard by counsel being a constitutional one. It follows that no intentional nor unintentional frittering away of the constitutional privilege in this regard should be tolerated . . ."

Some further consideration of this right is found in the case of House v. State, 130 Fla. 400, 177 So. 705, wherein the Florida Supreme Court said:

"The Supreme Court of the United States has held that *the right of one charged with crime to be represented by counsel includes a fair opportunity to secure counsel of his own choice, and that he is as much entitled to the assistance of counsel in preparing his trial as at the trial itself and that a denial of these rights is contrary to the due process clause of the 14th amendment of the Federal Constitution.*"

In so far as the instant case of petitioner McNeal, is concerned, the practical and mandatory application of these rules is found to squarely fit the circumstances about which he complains, if only by virtue of the following federal rule and to this State (Florida) as found in the decision of House v. Mayo, 63 Fed. Supp. 169:

"In Florida it is held that the right of the accused in all criminal cases to be heard by himself, or counsel or both, as guaranteed by Section II of the Declaration of Rights of the Florida Constitution, is more than a mere right of the accused. It is a mandatory organic rule of procedure in all criminal prosecutions, and [fol. 14] a requisite of a fair and impartial trial in that state. Deed v. State, 131 Fla. 362, 179 So. 849; Christie v. State 94 Fla. 469, 114 So. 450. This being the nature of the right conferred by the Florida Constitution, denial of due process guaranteed by the 14th Amendment which may be redressed, in appropriate circumstances in a federal court by habeas corpus. Ex-parte Hawk v. Kaiser, 323 U.S. 471, 65 Sup. Ct. 363, 89

L. Ed. 321 U.S. II 64 Sup. Ct. 448, 88 L. Ed. 572; Of Tomkins v. Missouri, 323 U.S. 485, 65 Sup. Ct. 370; House v. State, 130 Fla. 400, 177 So. 705."

Under these circumstances can this Honorable Court hold that this petitioner was capable of defending himself? In Powell v. Alabama supra, the United States Supreme Court, must have in mind such a case as the petitioner's. As that opinion covers the facts in this case. And it will be found in Betts v. Brady, the Supreme Court of the United States quoted in that opinion:

"Would it not be a little like mockery to secure to a pauper these solemn constitutional guarantees for a fair and full trial of the matters with which he was charged, and yet say to him when on trial that he must employ his own counsel, who could alone render these guarantees of any real permanent value to him? Why this great solicitude to secure him a fair trial if he cannot have the benefit of counsel?"

"Denial to the poor of the request for counsel in proceedings based on charges of serious crime has long been regarded as shocking to the Universal sense of justice. Throughout this country, for example, the Supreme Court of Indiana said: "'It is not to be thought of, in a civilized community, for a moment, that any citizen put in jeopardy of life or liberty should be debarred of counsel because he was too poor to employ such aid. "No court could be respected, or respect itself to sit and hear such a trial. The defense of the poor in such cases, is a duty resting somewhere which will be a once conceded as essential to the accused to the court, and to the public. "'Webb v. Baird, 6 Ind. 13, 18. and most of the states have shown their agreement by constitutional provisions, statutes or established practice judicially approved which assure that no man shall be deprived of counsel—merely be- [fol. 15] cause of his poverty. Any other practice seems to me to defeat the premise of our democratic society to provide equal justice under the law."

The above view taken by the United States Supreme Court, and also in Wade v. Mayo, says such a trial as the petitioner had is as no trial at all.

What is the meaning of the equal protection clause? It may be said generally that the equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances, so that all persons similarly circumstanced shall be treated alike.

How do the courts consider the due process of law provision? A statu-e which undertakes to deprive a person of his liberty without notice and opportunity to be heard by counsel certainly is invalid. The courts have held that the due process of law provision is the most important guaranty of personal rights to be found in the Federal or State Constitutions. It is a limitation upon arbitrary power, and is a guaranty against arbitrary legislation. No citizen shall arbitraiiy be deprived of his life, liberty or property. This the legislature cannot do nor authorize to be done. The United States Supreme Court, has repeatingly declared that due process guaranteed by the Federal Constitution requires a trial in a State Court, conforming to the fundamental concepts of justice which lie at the base of our civil and political insittitions, and that if the state supplies no corrective process the Federal Courts will intervene to protect the life or liberty of the citizen from a [fol. 16] judgment where the trial is not conducted according to such standard.

It will be seen by the authority cited in this petition, that it is the practice in Florida to appoint counsel to indigent defendants. Did the petitioner in this cause receive the same equal protection of the law as other defendants have received in the Florida Courts under the same circumstances?

Can it be said that the petitioner received a fair and impartial trial, as required under both Federal and State Constitutions, and the trial was conducted according to standards laid down by those constitutions.

The authoritys cited and the facts in this case warrants the serious consideration of this Honorable Court.

Wherefore, petitioner respectfully prays unto this Honorable Court, that the gracious State Writ of Habeas Corpus issue forthwith, according to law, directed the

the above named respondant, to the end, that relief appropriate to the circumstances be granted that pursuant thereto, petitioner be discharged from unlawful custody.

S. Elijah McNeal, Jr., Petitioner, Box 221, Raiford, Florida.

[fol. 16a] AFFIDAVIT OF SERVICE (Omitted in Printing)

[fol. 17] IN THE SUPREME COURT OF FLORIDA

[Title omitted]

WRIT OF HABEAS CORPUS—April 17, 1959

In the Name and by The Authority of the State of Florida:

To

R. O. Culver, as Custodian of Florida State Prison, Greeting:

You are hereby commanded that you have the body of Elijah McNeal, Jr. by you illegally detained and imprisoned, as it is said, and that you forthwith before the Justices of the Supreme Court of Florida, produce the said Elijah McNeal, Jr. in the City of Tallahassee, instanter, and that you do and receive what then and there shall be considered and determined concerning the said Elijah McNeal, Jr. and otherwise comply with the orders of said Supreme Court and that you then and there have this Writ and make due and proper return thereto.

Witness the Honorable Glenn Terrell, Chief Justice of the Supreme Court of Florida, and the Seal of said Court, at Tallahassee, the Capital, on this the 7th day of April, 1959.

Clerk Supreme Court of Florida.

[fol. 18] [File endorsement omitted]

IN THE SUPREME COURT OF FLORIDA

[Title omitted]

MOTION TO REQUIRE RESPONDENT TO SERVE A COPY OF HIS RETURN ON PETITIONER and

MOTION FOR EXTENSION OF TIME TO FILE REPLY BRIEF—Filed March 22, 1959.

To The Court:

Comes, now the petitioner Elijah McNeal Jr. and shows unto the Court that he filed a petition for writ of habeas corpus, this Honorable Court issued an order to show cause on April 7, 1959, and the Respondent filed his return on April 16, 1959, a copy of which was received by petitioner, on April 18, 1959.

The return served on petitioner, is not a true copy of the Return filed before this Court. On page 2, of respondent's return will be found this statement," . . . as will be more clearly reflected by a more perusal of said records, a true and correct copy of each being attached hereto and marked Exhibit "C" and "D" respectively," on page 4 of the respondent's return will be found this, The transcript of testimony attached hereto reflects throughout . . ."

The proof of service states a copy of the return was mailed to your petitioner, the petitioner was not served with Exhibit "D" of the return, and Exhibit "D" was *not* attached to the return, therefore petitioner cannot make his reply without a copy of the return.

[fol. 19] The rules of the Supreme Court of Florida, require the respondent to serve a copy of his brief or return on your petitioner, See Part (4) Rule (25) Section (3).

Wherefore, your petitioner prays unto this Court to issue an order directed to the Respondent to serve a copy of Exhibit "D" of his return on your petitioner, and grant an extension of time to file the reply brief, or issue an order ruling the return is insufficient, and grant the writ of habeas corpus as prayed for.

Petitioner shall ever so pray:

S. Elijah McNeal, Jr.

I hereby certify that I this day below have mailed to the Attorney General of Florida, the Honorable Richard W. Ervin a true copy of this Motion.

S. Elijah McNeal Jr., No. 62823. Box 221 O Y Raiford, Florida

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[fol. 20] IN THE SUPREME COURT OF FLORIDA

[Title omitted]

RESPONDENT'S RETURN TO WRIT OF HABEAS CORPUS

Comes now R. O. Culver, respondent in the above entitled cause and files this his response to the Writ of Habeas Corpus heretofore issued herein.

I

Respondent holds the petitioner in detention of his liberty under the authority of that certain commitment duly issued in this cause on April 1, 1958, by the Honorable Roy H. Amidon, Judge of the Criminal Court of Record in and for Polk County, Florida, whereby your respondent was duly ordered to keep and safely imprison the petitioner for a period of 20 years, all of which will be more clearly [fol. 21] reflected by a true and correct copy of said commitment attached hereto and marked Exhibit "A."

II

The aforesaid commitment was based upon a valid judgment and sentence entered against the petitioner for the offense of assault with intent to commit murder in the first degree, said judgment and sentence having been entered on the above named charge on March 31, 1958, as will be more clearly reflected by a true and correct copy of said judgment and sentence attached hereto and marked Exhibit "B."

III

Respondent denies that the trial court refused to furnish petitioner a copy of the information entered against him, as alleged in petitioner's first complaint set forth on page 3 of petition herein, as no such alleged refusal appears either in the court minutes reflecting the arraignment of petitioner nor in the trial record of this cause as will be more clearly reflected by a mere perusal of said records, a true and correct copy of each being attached hereto and marked Exhibits "C" and "D" respectively.

Answering affirmatively respondent submits that the pertinent portion of Section 11, Declaration of Rights of the [fol. 22] Florida Constitution, to-wit: ". . . and shall be furnished with a copy of the indictment against him . . ." was enacted for the benefit of defendants in criminal cases, and such benefit may be waived by either the positive action of a defendant or by his failing to make timely request for a copy of such charging document.

In this regard we have failed to find any Florida decisions directly on point, see 89 So. 222, however, we call to the Court's attention the following pertinent excerpt from Article I, Section 6 of the Alabama Constitution of 1901:

> "That in all criminal prosecutions, the accused has a right to be heard by himself and counsel or either; to demand the nature and cause of the accusation; and to have a copy thereof;

The Supreme Court of Alabama in *Howard* v. *State*, 41 So. 301, 146 Ala. 149 ruled on this provision in the following language:

> "By Section 6 of the Bill of Rights in the Constitution of 1901 it is provided that the accused in a criminal prosecution shall have the right 'to demand the nature and cause of the accusation and to have a copy thereof.' This right, however, is one that may be waived by the accused. On the facts stated this court committed no error in its ruling. The defendant had been informed of the accusation against him on his arraignment, and pleaded not guilty. He then delayed until his case was called for trial, more than 10 days after his arraign- [fol. 23] ment, before demanding a copy of the indictment. By this conduct he waived his right to a copy,

and under the circumstances the court was under no duty to require that a copy of the indictment be furnished him."

Similar rulings were made by the Supreme Court of Alabama in *Evans* v. *State*, 62 Ala 6; *Shaffer* v. *State*, 202 Ala 243, 80 So. 81, and by the Supreme Court of Louisiana in *State* v. *Price*, 6 La. Ann. 691.

The petition herein reflects upon its face that the petitioner did plead to the information as same was read to him in open court. The transcript of testimony attached hereto reflects throughout that petitioner was well aware of the nature of the charge for which he was being tried; that he participated in the examination of witnesses and testified in his own behalf. Therefore even if we admit that no copy of the information was furnished the petitioner, the error, if error it be under the circumstances, would be absolutely harmless, and one upon which he could not prevail on appeal, and he is accordingly estopped from raising such point in habeas corpus proceedings.

In concluding this point, as a matter of precaution, it is suggested to the Court that the service of a copy of the indictment upon the defendant in a criminal case is not a judicial act, but an executive or ministerial act; and its [fol. 24] performance need not be shown as a matter of record proper as is the case of the indictment itself and of the orders of the court. Therefore, since a court record will seldom, if ever, reflect that a copy of an indictment was physically handed to a defendant, then to allow a convicted felon to prevail in habeas corpus proceedings on a blank allegation that he was refused such copy, would be to provide a most effective means of bringing about immediate relief to the present crowded conditions in Raiford.

IV

Respondent denies that petitioner's constitutional rights were violated by the court's alleged refusal to appoint counsel in his behalf.

In this regard, the record reflects that no capital offense was involved; that the trial judge scrupulously protected the rights of the petitioner throughout the trial of this cause; that the petitioner effectively represented himself to the end that a verdict for a lesser offense was returned from

that with which he was charged; and the law on this point being so well settled in Florida, it is considered unnecessary to discuss this question further.

[fol. 25] V

Respondent denies each and every remaining material allegation in the petition herein.

WHEREFORE, respondent respectfully moves this Court to quash the writ of habaes corpus heretofore issued in this cause; to dismiss the petition heretofore filed and to remand petitioner to the custody of the respondent.

Respectfully submitted, R. O. Culver, State Prison Custodian, Respondent

Richard W. Ervin, Attorney General. Odis M. Henderson, Assistant Attorney General, Counsel for Respondent.

CERTIFICATE OF SERVICE (Omitted in Printing)

[fol. 26] EXHIBIT "A" TO RESPONDENT'S RETURN TO WRIT OF HABEAS CORPUS

STATE OF FLORIDA

62823

April 22, 1958

UNIFORM COMMITMENT TO CUSTODY OF DIVISION OF CORRECTIONS

CRIMINAL COURT OF RECORD, POLK COUNTY, MARCH TERM, 1958

Conviction for ASSAULT TO MURDER IN THE SECOND DEGREE

Date of conviction February 26, 1958
Date of sentence imposed March 31, 1958
Term of sentence Twenty (20) Years

Case No. 19132

STATE OF FLORIDA, Plaintiff

vs.

ELIGAH MCNEAL, JR. alias LIGE MCNEAL, JR. Defendant

In the name and by the Authority of the State of Florida, to the Sheriff of said County and the Division of Corrections of said State, greeting:

The above named defendant having been duly charged with the above named offense in the above styled Court, and he having been duly convicted and adjudged guilty of and sentenced for said offense by said Court, as appears from the attached certified copies of Information, judgment and sentence, which are hereby made parts hereof;

Now, therefore, this is to command you, the said Sheriff, to take and keep and, within a reasonable time after receiving this commitment, safely deliver the said defendant into the custody of the Division of Corrections of the State of Florida; and this is to command you, the said Division of Corrections, by and through your director, superintendents, wardens, and other officials, to keep and safely imprison the said defendant for the term of said sentence in the

institution in the state correctional system to which you, the said Division of Corrections, may cause the said defendant to be conveyed or thereafter transferred. And these presents shall be your authority for the same. Herein fail not.

Witness the Honorable Roy H. Amidon
Judge of said Court, as also Robert J. Haslett
Clerk, and the Seal thereof, this the 1st day of April, 1958.
Robert J. Haslett, Clerk of said Court, by Earline L. Tucker, D.C. (Seal)

(To be used in committing defendants under indeterminate sentences as well as under sentences of imprisonment for definite periods.)

D of C Form No. 9

[fol. 27] EXHIBIT "B" TO RESPONDENT'S RETURN TO WRIT OF HABEAS CORPUS

IN THE CRIMINAL COURT OF RECORD IN AND FOR POLK COUNTY, FLORIDA

No. 19132

STATE OF FLORIDA,

vs.

ELIJAH MCNEAL, JR. alias LIGE MCNEAL, JR.

ASSAULT TO MURDER IN THE FIRST DEGREE

The above entitled cause coming on this day for final hearing pursuant to the jury in this case having rendered a verdict of guilty on February 26, 1958 to the offense of Assault to Murder in the Second Degree, the Defendant appears before the Court for sentence to be pronounced upon him, and being asked by the Court if he had anything to say why the sentence of the law should not be passed upon him, offers nothing in bar thereto.

Therefore, the Court adjudges you, Elijah McNeal, Jr., alias Lige McNeal, Jr., to be guilty of the offense of Assault

to Murder in the Second Degree, for which you stand convicted by decision of the Jury, and it is the sentence, order and judgment of the Court that you, Elijah McNeal, Jr., alias Lige McNeal, Jr., for your said offense, be confined in the State Prison of Florida at hard labor for a term of Twenty (20) Years.

This March 31, A. D. 1958.

[fol. 28] EXHIBIT "C" TO RESPONDENT'S RETURN TO WRIT OF HABEAS CORPUS

ARRAIGNMENT

Minute Book 45, Page 218

No. 19132

STATE OF FLORIDA,

vs.

ELIJAH MCNEAL, JR., alias LIGE MCNEAL,

ASSAULT TO MURDER IN FIRST DEGREE

The defendant in the above entitled cause appearing this day before the Court and being duly arraigned, admits identity and enters a plea of "not guilty" to the Information filed in said cause. Whereupon the Court Orders that this cause be continued until January 20, A. D. 1958.

[fol. 29] EXHIBIT "D" TO RESPONDENT'S RETURN TO WRIT OF HABEAS CORPUS

IN THE CRIMINAL COURT OF RECORD IN AND FOR POLK COUNTY, FLORIDA

Case No. 19132

STATE OF FLORIDA, Plaintiff,

vs.

ELIJAH MCNEAL, JR., alias LIGE MCNEAL, JR., Defendant

Trial of the above cause was held in the Criminal Courtroom, County Court House, Bartow, Polk County, Florida, on February 26, 1958, at 10:00 A.M. o'clock before the Honorable R. H. Amidon, Judge, and a jury. Appearances were Honorable Clifton M. Kelly, County Solicitor, for the plaintiff, the defendant in his own behalf, the witnesses, the Court Clerk and the Acting Court Reporter.

Thereupon, the following proceedings were had and taken:

ELLIX SCURRY having been produced as a witness on behalf of the plaintiff and having been previously sworn, testified as follows:

Direct examination.

By Mr. Kelly:

Q. Give us your name.
A. Ellix Scurry.
Q. Ellix Scurry. Where are you from?
A. Lake Wales, Florida.
Q. Now, do you know Lige McNeal?
[fol. 30] A. Yes, sir.
Q. All right, where is he?
A. Right there. (indicating.)
Q. How long have you been acquainted with Lige McNeal?
A. Ten to twelve years I've been acquainted with him.
Q. Did you have occasion to see him on the 10th day of November, 1957?

A. Yes, sir.
Q. Where did you see him at?
A. At the Blue Chip.
Q. Where is the Blue Chip?
A. Lake Wales.
Q. What county is that?
A. Polk County.
Q. County and state?
A. State of Florida.
Q. Tell us if anything unusual happened on that particular date when you saw him.
A. I was setting in the back trying to light a deep fryer, and——
Q. Talk louder, please. You were sitting in the back trying to light a deep fryer and what?
A. And he started——
Q. Who is "he?"
A. McNeal. And he started to say some bad language.
Q. Was that in the daytime or night time?
A. That was night time.
[fol. 31] Q. What did you say he did?
A. Started talking some bad, profane language.
Q. Explain what you mean by profane language.
A. Cussing.
Q. Was it of a mild nature or dirty?
A. About as dirty as I could think of. And I told him to either quit or go out of the place.
Q. Was there other people in there?
A. Yes, sir, a lot more people. And he told me to hell with me—in a way of speaking—and he say, "Any where I be at——"
Q. He said what?
A. He said, "I'll say anything I want to anywhere I be at." And I got up and walked around the counter to where he was at, and I told him I wasn't going to have none of that, that there was nothing for him to do but get out of the place.
And we was tied up a little bit then. And after a lick or two was passed, he walked on out; and it was about——
Q. He walked on out of your place?
A. And about fifteen minutes after then—I've got a cold—I forgot about it until I saw what looked like a blaze in my face.

Q. You say you saw a blaze of fire in your face?

A. That's right.

Q. What else besides the blaze of fire you saw in your face did you see?

A. I seen him with a shotgun, but I'd already went back in the place.

[fol. 32] Q. You see him with the shotgun?

A. Yes, sir.

Q. Who had the shotgun?

A. He did. (indicating)

Q. How far was he from you at that time?

A. About as far as from here to the benches.

Q. About as far as from where you are to here?

A. That's right, about that distance.

Q. For the purpose of the record, it is estimated to be about fourteen feet. Is that right?

A. That's about the distance.

Q. Was anyone else standing there or seated where you were located at your place when he came back?

A. Well, I was so excited so much I didn't have time to see who was there, because I turned and went back in the building as quick as I could.

Q. You turned and went back in the building?

A. I didn't even see the boy that got shot until it was all over there.

Q. When he left there, did he say anything to you before he left?

A. He didn't say anything. He didn't say he was coming back. He just left.

Q. When you looked up and saw him with the shot gun, how long after you'd seen him with the shotgun before you saw the blaze in your face?

A. That's the first thing I seen was the fire. He missed [fol. 33] me, and I whirled and went back in the building, and I noticed him then, and I went on back in the building.

Q. You noticed him then?

A. That's right.

Q. Did you say anything?

A. I didn't have time, because I wasn't there but a minute or a second.

Q. You went back in?

A. Yes, sir.

Q. Did you talk to him any more that night?

A. No, sir.

Q. What did you do after he fired the shot there?

A. Well, I was at that place peeping out, and he went across the street into this building, condemned building.

Q. He went across the street?

A. Yes, sir.

Q. Did he take the gun with him?

A. Yes, sir.

Q. How far was he from the place you peeped out, if you know?

A. As far as the door. I didn't look out the door; I was looking out of the glass there. I wasn't right at the door.

Q. Did you recognize him after you got back in?

A. I recognized him before I got back in there.

Q. That it was Lige: that he was the man?

A. Yes, sir.

Q. When you saw the flash of fire, did you hear anything?

[fol. 34] A. The gun went off.

Q. You heard the noise of a gun. Are you acquainted with the noise of a gun?

A. I got excited right then.

Q. It sounded like a shotgun?

A. I know it was shotgun, because I seen it.

Q. After you went back out, the first thing you noticed was this man here?

A. That's right.

Q. There was some other people around there, wasn't there, on the sidewalk?

A. There was a lot of people on the street, but that time I don't know anybody personally.

Q. Do you know of any other Ellix Scurries down there?

A. Do I know any other Ellix Scurry? I don't know but one of them.

Q. Do you know of any other Ellix Scurry down there in Lake Wales?

A. No, sir.

Q. All right.

Mr. Kelly: That's all.

The Court: Now, Lige, do you want to ask him anything about what he has said here?

Defendant: Yes, sir.

The Court: All right, go ahead and ask him anything you want to about what he's said.

[fol. 35] Cross-examination.

By the Defendant:

Q. You said you were the one that come back there and told me to stop cursing, but now was your brother in there, Ernest?

A. Yes.

Q. Wasn't he the one that come back there?

A. He was the first one that come back, but I come back that time.

Q. You said you hit me, but Ernest was the one that hit me.

The Court: No, that is testifying and it isn't time for you to testify. You want to ask him, "Did you hit me?" Let me ask him this.

In other words, you and your brother both were there, and you went back and talked to him?

A. Yes, sir, Ernest went back first and I called Ernest back because I knowed he was going to get mad. And he got me hot. I'm the one that hit him.

The Court: Did he have a gun or anything with him when he was in there that you know about?

A. No, sir.

The Court: All right, Lige, you want to ask him anything else?

Defendant: No, sir.

(Witness excused.)

[fol. 36] GEORGE FIELDS having been produced as a witness on behalf of the plaintiff and having been previously sworn, testified as follows:

Direct examination.

By Mr. Kelly:

Q. Give us your name, please.

A. George Fields.

Q. Your occupation?

A. Police officer, City of Lake Wales.

Q. How long have you been working with the City of Lake Wales as a police officer?

A. Two years and three months.

Q. All right, now, and you are still so employed now, aren't you?

A. Still so employed.

Q. On the 10th day of December, were you on Duty or off duty?

A. I was on duty.

Q. Where were you in Lake Wales, what place, officer?

A. On that particular night I was parked on the street there at the station where I usually park.

Q. How's that?

A. I was parked on the street there at the station.

Q. In other words, you have a station there near the stores and you were there?

A. I was there.

Q. With reference to the place of business where Ellix Scurry works, how far was that from the place where you were?

[fol. 37] A. About three quarters of a block, I'd say.

Q. About three quarters of a block.

A. Well, it's from C to B, and he's about two buildings, the building just off B Street.

Q. Very close by?

A. Very close by, just off Lincoln Avenue.

Q. Now, that night did you hear anything unusual?

A. Yes, sir, I did.

Q. What time of night did you hear this unusual noise?

A. I'd say between eight and eight-thirty, somewhere along there.

Q. What was this unusual noise?

A. It was a blast from a shotgun.

Q. All right, tell us what you saw and what you did when you heard this blast.

A. Well, when I heard this blast, for a minute I thought one time it was a fire cracker; but I got out of my car and whirled down the street, and I saw this McNeal.

Q. Is that him right there?

A. (Witness nods head up and down.) And I yelled, "McNeal." And he crossed the street with the shotgun in his hands and he went straight into a deserted building, an old three-story building and barricaded himself in there. And some one else yelled and said, "Don't go in there; he's got a shotgun." And I had noticed he had a shotgun. I got a couple of cars to be in between me and him.

The first time I yelled, he said, "I got a gun." And I [fol. 38] said, "I know you have," and I said, "Come on out, I've got the place surrounded."

And about three minutes after I demanded him to come out, he came out with the shotgun in his hand, and he unlocked it and a shell came out, which I wasn't able to find. And I casually walked up to him taking my time and he stood there with the gun lying on the sidewalk.

Mr. Kelly. Mr. Clerk, will you mark this For Identification?

. . . The exhibit above referred to was marked For Identification State's Exhibit 1.

Q. I show you now State's Exhibit 1, and it is numbered one For Identification, and I ask you have you seen this Exhibit before?

A. Well, it had this tape around it and it was wired with this piece of wire.

Q. Is that the shotgun?

A. It looks very much like the shotgun. I mean, we have three or four shotguns put up sort of like this, but this looks very much like the shotgun I took from Lige McNeal.

Q. Was it a single barrel?

A. Single barrel shotgun.

Q. Now, officer, what did you do with the shotgun after you took it off him that night? Did you take it off him?

A. Well, I picked it up. I walked in front of him and picked the gun up, and I said, "McNeal, you're under [fol. 39] arrest." And he said, "I know I am."

And so I brought him across the street to where Ellix Scurry was and noticed this other boy was shot in the front of the leg. And I demanded somebody to take him to the hospital immediately.

And he and Scurry got into another argument while I was trying to get the boy to the hospital. He was cursing Scurry again.

Q. Who was, McNeal?

A. McNeal. And I caught him by the arm and said, "You'll have to learn better than that." He said, "Turn me loose, I'm not scared of your damn pistol."

And I said, "McNeal, you're going with me," I said, "You're still under arrest," and I said, "Let's go." And I gave the other boy the shotgun to keep. I didn't know what was in McNeal's mind, but I wanted to be ready.

And by the time I took him around to put him in the car, officer Earl Branch and Lt. Daughtry came along, and I put him in the other police car, and we carried him on to jail.

Q. Now, what, if anything, did Lige McNeal tell you about Ellix Scurry?

A. Well, on our way to the station we told McNeal what had happened and what he had did. He said he was sorry he shot these others boys, he intended to kill Scurry, and he said, "I'll still do it."

Q. Let's get this straight now. He said he was sorry [fol. 40] he shot the other boy?

A. He said, "I'm sorry I shot the other boy; I intended to kill Scurry, and I'll still get him."

Q. What Scurry was he talking about?

A. Well, both the brothers; he didn't like the way he was treated in the place.

Q. Well, now, this other fellow that was shot there that night, was he shot pretty bad?

A. Pretty bad. I believe he was in the hospital about three days; the front of his leg was shot.

Q. Bird shot?

A. I think so. There was four shot at Lige's that night; and when he finished, this one, I understand, was shot pretty bad. And then we got a call there was three others shot.

Q. Bird shot?

A. Bird shot; one was hit in the face once or twice.

Q. They all were shot right in front of that place?

A. That's right.

Q. Now, the one that was shot so bad, he hadn't moved out of his tracks?

A. He hadn't moved out of his tracks. He was sitting on the bench and he didn't move. He just remained almost frozen to the bench. When I found him he was bleeding and I just demanded that some one rush him on to the hospital; and so they did. And after we finished booking McNeal, the Lieutenant and I went on out to the hospital. [fol. 41] Q. But he apologized for shooting the other fellow?

A. Of course he said he didn't intend to shoot the other boy naturally, but he did intend to kill Scurry.

Q. How many times did he say he shot?

A. Well, he didn't say. He didn't say how many times he shot.

Q. All that happened in Polk County, Florida, didn't it?

A. It all happened in Polk County, Florida.

Mr. Kelly: That's all.

The Court: All right, Lige, do you want to ask him anything about what he's said?

Defendant: No, sir; no, sir.

(Witness excused.)

EARL BRANCH having been produced as a witness on behalf of the plaintiff and having been previously sworn, testified as follows:

Direct examination.

By Mr. Kelly:

Q. Give us your name, please.
A. Earl Branch.
Q. Your occupation?
A. Police officer, City of Lake Wales.
Q. Officer, do you know Lige McNeal, this man here?
A. Yes, sir.
Q. Did you have occasion to see him on the 10th of December, 1957?
[fol. 42] A. Yes, sir.
Q. Where did you see him?
A. Saw him in the colored quarters.
Q. What was your occasion for seeing him there?
A. George Field had him in custody and was fixing to bring him up to jail, and I stopped and asked him what the trouble was. He briefly told me and I said, "Put him in the car and we'll take him up there."
Q. Did you have any conversation with Lige McNeal?
A. Yes, sir. I asked him about what he'd shot that boy for, and he said he shot the wrong man and he was sorry about shooting this guy that caught the shot in the leg; Scurry was the one he was after; he didn't like the way he treated him and wanted to kill him.
Q. Wanted to kill him?
A. Yes.
Q. Did he tell you how he came into possession of the shotgun?
A. Yes, sir; he told about going there and about getting thrown out, and cussing, and he went home and got the gun; said he throwed it out the window.
Q. Said he went and got it?
A. Yes, sir.
Q. Did you see the shotgun?
A. Yes, sir; I took the gun and turned it over to the deputy sheriff. Yes, sir, that's the same one.

Q. That's the same shotgun?

[fol. 43] A. Yes, sir.

Mr. Kelly: Your Honor, I want to introduce this in evidence as an Exhibit for the State.

The Court: Be admitted in evidence.

. . . The shotgun above referred to was received into evidence and marked State's Exhibit A.

Q. Did you have occasion to determine whether or not Lige McNeal had sort of been drinking that night?

A. He had the smell of alcohol on his breath.

Q. Have you had an opportunity in your lifetime to observe people who are under the influence of liquors, wines or beer?

A. Yes, sir.

Q. Did you form any opinion that night as to whether or not he was under the influence of intoxicating beverages?

A. He had been drinking, but he wasn't under the influence to where his normal faculties were impaired visibly.

Q. Just drinking; you could smell it.

A. Yes, sir.

Mr. Kelly: That's all.

The Court: Lige, you want to ask him anything about what he has said?

Defendant: No, sir.

(Witness excused.)

[fol. 44] Don Neal having been produced as a witness on behalf of the plaintiff and having been first duly sworn, testified as follows:

Direct examination.

By Mr. Kelly:

Q. Your name, please?

A. Don Neal.

Q. And your occupation?

A. Deputy Sheriff, Polk County.

Q. You work under Sheriff Hagan Parrish?

A. Yes, sir.

Q. Now, on November 10, 1957, you were a deputy sheriff that night, weren't you?

A. Yes, sir.

Q. Did you on that night have occasion to see Lige McNeal?

A. If I recall correctly it was at the police department after all this happened.

Q. Did you talk to him?

A. I took some information for him, yes, sir.

Q. What did he tell you about that incident up there?

A. He told me about having the argument at the Blue Chip there with Scurry; and he told me that he blacked out; he didn't recall anything from the time he left after the argument at the Blue Chip until Officer Fields had him.

Q. Came and got him out of that building?

A. Yes.

[fol. 45] Q. During all this period of time did he say what happened?

A. He told me he blacked out.

Q. Did he give you any reason why he blacked out?

A. No, sir.

Q. Did you go back out there and look around out there and determine what pattern those shots went outside of that building?

A. Yes, sir.

Q. What was the pattern?

A. There was a post—There is a kind of a shed or port type roof out over the sidewalk in front of the Blue Chip Drive-In, where the argument took place.

Q. There was a post starting at the roof onto the sidewalk?

A. Yes, sir. There were pellet marks all up and down I'd say from the sidewalk up three feet—pellet marks all around the post from the sidewalk were the stray shot had hit the post.

Q. That bench where this fellow was standing or sitting, he would get the whole load in his lower limbs? Or where was the pellets there in regard to the bench?

A. I couldn't see any. The bench, as you know, is there close to the post which was only a matter of four or five feet from the bench, I would estimate.

Q. Did you ever find an empty shell that night?

A. No, sir, he looked for it that night, Officer Fields looked for it that night, and I looked for it that morning.

Q. Now, that shotgun, it was turned into the Lakeland [fol. 46] Police Department to you, wasn't it?

A. Yes, sir.

Q. And you brought it over here to Bartow?

A. Yes, sir.

Q. Is this the shotgun that was turned over to you?

A. Yes, sir.

Q. Same condition and everything?

A. Yes, sir.

Mr. Kelly: All right, Your Honor.

The Court: Lige, do you want to ask him anything?

Defendant: No, sir.

(Witness excused.)

Mr. Kelly: The State rests its case, Your Honor.

The Court: All right, now, Elijah, that is the State's case. If you want to, you can take the stand and tell your side of it. If you don't want to, you don't have to; because the burden is on the State to prove your guilt and not upon you to maintain your innocence. If you don't take the stand and testify, I will instruct the jury that they cannot consider that as any evidence of your guilt whatsoever. If you do take the stand and testify, then the State has a right to cross examine you. Do you want to tell your side of it?

Defendant: Yes, sir.

The Court: All right.

[fol. 47] Elijah McNeal, alias Lige McNeal having been produced as a witness in his own behalf and having been previously sworn, testified as follows:

Defendant:

Q. Is he going to ask me questions?

The Court: No, you just go ahead and tell your side of it.

Q. I'll just start from the time of the argument inside the place: I was sitting at the bar, at the counter, drinking

a beer that girl that was working there had sold me; and E. S. and his brother were on the other side of the building there fixing a stove or something behind a counter there.

And I was teasing this girl about a boy that she'd gone dancing with in the place that evening and—Well, it wasn't no real bad cursing and he'll say the same thing. And some of those words were—well, they was not too bad.

And Ernest walked over there and said, "McNeal, I want you to stop cursing in my place." And I said, "Man, I don't even have to come in the place." And I said, "As soon as I finish drinking my beer, I'll leave."

And I turned around on the stool I was sitting on and I finished drinking the beer, and Ernest hit me. And E. S. run up. And I hit him. And he said, "I'll take care of this." He said, "That's all right, turn him loose. I got him."

And I'd dropped my cap and he handed me my cap and I walked on down the street. I don't know if I went home or [fol. 48] where. But from that time on the next thing I remember was George Fields calling me and I was standing back there in that building without no shirt and no shoes and I had the shotgun.

Now, whethere me knowing whether I fired the gun or not, I don't know that part is a complete blank to me. I have been to the hospital at Bay Pines for some wounds I received in the army, a head injury. I have occasionally, when I get excited or over-headed, blanked out.

And it was the 8th of April, 1956, that I went over for treatment and stayed over there six months; and they sent me a paper that stated it was service connected and I could come to the hospital any time. And I lost that, and can I give you that one? (Handing paper to the Judge.) That paper is a statement from the doctor that examined me before I went to the hospital, and he give me that to bring over. It is a statement that I do have occasion to have blackout spells.

The Court: This statement would not be admissible. You could put the doctor on and have him testify; but we cannot admit any statement like this. We will allow you to testify about it.

Q. But I ask the mercy of the Court. I didn't at any time intend to kill anybody.

I was in the army for almost six years, and I made expert

with just about every weapon I fired, even a shotgun; and if I'd intended to kill a man, then I believe I would have [fol. 49] killed him. I was trying to scare them and stop them from jumping on people.

Cross-examination.

By Mr. Kelly:

Q. You say you were trying to scare him?

A. I say I must have been trying.

Q. Well, now, Lige, how much beer had you had to drink that night?

A. Well, I think it was three cans, three small cans.

Q. Had you had any liquor to drink that day?

A. No, sir.

Q. Now, that blackout trouble you say you have, does that bother you most when you drink beer or when you don't drink beer?

A. Well, I could be working and get too hot, or when I gets excited, I blacks out.

Q. I didn't ask you that. I asked you when you drink beer, does that have any effect on your nervous condition, the blackouts? Does that beer have a tendency to make that condition be more severe?

A. I don't think so, sir.

Q. There is no connection between the blackouts and the beer?

A. No, sir.

Q. Is this your shotgun?

A. It's my father's.

[fol. 50] Q. Is that your shotgun?

A. Yes, sir.

Q. Now, will it shoot?

A. I think so.

Q. How's that?

A. I—They said I had it that night, so I guess it will.

Q. Did you have that shotgun that night?

A. I had it because I throwed it down myself.

Q. When you came out of that building, you had this shotgun?

A. That's right.

Q. Now, what use did you have with a shotgun there in that building, Lige?

A. I don't know, sir.

Q. Now, was you mad?

A. Now sir.

Q. Were you mad at Ellix Scurry?

A. No, sir, I wasn't mad with anybody at that time.

Q. How long a time—how many minutes elapsed from the time you left that Blue Chip that night after they had, you say, throwed you out about that cussing, how much time elapsed from that time to the time you say the next thing you remember when you come out of the building with the shot gun and Officer Fields took the gun away from you? How much time did it take?

A. I don't know, sir.

Q. Do you have any idea?

[fol. 51] A. No, sir, I don't know where I went after I left.

Q. Where is the normal place for that shotgun? You say it belonged to your daddy. Where is that shotgun kept?

A. It's kept in a room with a twenty-two rifle I got to the house.

Q. It was kept in a room at the house where you were living?

A. Yes, sir.

Q. Do you live with your father, or is he not living?

A. He died the 20th of December.

Q. He was living at that time?

A. Yes, sir.

Q. Did you know when you went down there—Did you have the shotgun when he throwed you out there for cussing? Did you have the shotgun at that time?

A. No, sir.

Q. Did you go get it?

A. I must have.

Q. Did you have it in that old building out there or did you have it at your house?

A. I didn't bring no weapon down the street with me. The reason for me being down the street was to go over to Lakeland. I had give a boy two dollars to take me over there. And he got sick and I went upstairs and I told him I would wait around over there on him. There was a dance and I was going to get a girl.

Q. You were going to give a boy two dollars to take you to Lakeland?

[fol. 52] A. I was going over there, yes, sir.

Q. And you hadn't left to go to the dance?

A. No, sir, I hadn't.

Q. Was this Saturday or Sunday?

A. Saturday.

Q. Where was the dance going to be?

A. American Legion Hall.

Q. Now, Lige, after Officer Field got you out of that building and you said you let him have that shotgun, did you have another argument, some more words with Ellix Scurry in the presence of Officer Fields?

A. When I come across the street, it wasn't in front of the Blue Chip, it was in front of the cleaners.

Q. That was after Officer Fields arrested you, wasn't it?

A. Yes, sir.

Q. You had some more words with Scurry?

A. Yes, sir, on the street and in the car.

Q. Did you see them people that had been shot?

A. Yes, sir.

Q. What was the gun loaded with?

A. I don't know.

Q. Bird shot?

A. I don't know, sir.

Q. Now, when you come out from that building and the officer told you to unbreach that gun, did an empty shell [fol. 53] jump out, or a good shell?

A. It was an empty shell, because I couldn't get it out.

Q. When did the shell that was empty, when was it put in that gun?

A. I don't know.

Q. How's that?

A. I don't know.

Q. When was the shell—you say it was an empty hull that jumped out of the gun when the officer got out there and told you to unbreach it—when was that shell fired?

A. I don't know, sir.

Q. You don't know. At the place where you live with your mother, was the gun kept on a rack?

A. It is kept in the closet in my room.

Q. Kept in the closet in your room. Do you remember going to get it that night?

A. No, sir.

Q. It was in your room and it was your daddy's gun?

A. See, that's a big family of his, and the gun and the rake and the lawn mower, and they keep it in my room because nobody sleeps in my room but me.

Q. Now, that gun, as a rule, was it kept loaded or unloaded?

A. Unloaded.

Q. So you don't know how that empty shell got in that gun?

A. No, sir.

Q. Did you have any empty shells at your house, bird shells?

[fol. 54] A. I guess there's about three.

Q. Where's that?

A. In the closet, in a coat pocket hanging in there.

Q. In that room where you are at?

A. No, sir.

Q. Your daddy's coat pocket?

A. Yes, sir.

Q. How much do you weigh, Lige?

A. Well, I weigh now 191.

Q. 191 pounds?

A. Yes, sir.

Q. How much did you weigh then?

A. I don't know.

Q. 210?

A. Something like that.

Q. How tall are you?

A. Six-two.

Q. How old are you?

A. Twenty-nine.

Q. Are you married or single?

A. Single.

Q. Have you learned—when you were in the Army you were told about guns would kill people, weren't you?

A. Yes, sir.

Q. Do you have what is normally referred to as a bad temper?

A. Repeat that, sir.

[fol. 55] Do you have a bad temper? By that I mean do you just go out of your head when you get mad?

A. No, sir.

Q. Now, when Scurry hit you that night, did you get mad?

A. No, sir.

Q. You just said, "okay." Is that what you said?

A. And walked out of the place.

Q. Now, had you been cussing in there?

A. I had said three or four words, and if these ladies weren't present, I'd tell you what I said.

Q. What you said is not for ladies to hear. Is that right?

A. Ladies can hear it, but I mean——

Q. You knew it was wrong, didn't you? It's not polite. Is that right?

A. Well, it all depends on who you're talking to.

Q. Well, there were some colored women in there, weren't there?

A. They was cooking in there, wasn't talking to me.

Q. And that is his place of business?

A. It belonged to Scurry.

Q. You said you got a head injury, when did you get this head injury?

A. In 1952.

Q. Do you draw an army pension or something?

A. I draw compensation for the school, but the pension was cut off.

Q. In other words, you are okay as far as the government is concerned?

[fol. 56] A. I goes and gets pills.

Q. But you don't get any money?

A. Yes, sir, some.

Q. You say your disability was cut off and you don't draw a pension now. It that right?

A. Now, what time was this? I think——

Q. Don't tell me what you think; tell me what you know.

A. When I was in the hospital, I stayed over there four months locked in the ward, psycho part of it; and the four months I was over there, I had to stay in there locked up all the time. Mama was the only one that could come and see me. And, well, about the latter part of the four months he give me a weekend pass. He was trying me to see if I would come back.

And I went home and I come back on time. And I asked mama to come and sign for me as that was the only way I could get back. I had to have a guardian to sign. And she

come over there that day and begged the doctor to let me go home.

Q. You work anywhere, Lige?
A. Sometimes.
Q. What kind of work do you do?
A. I work at the nursery, Lake Garfield.
Q. Usually do reasonable work?
A. Something, not too hard.
Q. You know how to go to Lakeland?
A. Yes, sir.

[fol. 57] Q. You know a shotgun will kill you, don't you?
A. I guess everybody knows a shotgun will kill you.
Q. How's that?
A. I guess everybody knows a shotgun will kill you.

Mr. Kelly: That's all.

(Witness excused.)

The Court: Now, Lige, if you had an attorney, he would argue the case before the jury, what is called the opening argument and the closing argument. You can get up and talk to them first and then State will argue and then you will have the closing argument, if you wish to argue to them, plead your case.

Defendant: Well, sir, I don't quite understand the meaning of that.

The Court: Well, suppose you let the state make their argument and you listen now, pay close attention to what Mr. Kelly has to say for the State, and then you can get up here and answer him.

(Mr. Kelly argued on behalf of the State.)

The Court: Now Lige, do you want to make any argument to them?

Defendant: No, sir.

[fol. 58] REPORTER'S CERTIFICATE TO FOREGOING TRANSCRIPT
(Omitted in printing)

[fol. 59] [File endorsement omitted]

IN THE SUPREME COURT OF FLORIDA

[Title omitted]

PETITIONER'S REPLY BRIEF—Filed May 23, 1959

To the Supreme Court:

In the Respondent's return, he denies petitioner requested a copy of the Information, and he in his return argues that failure to give petitioner a copy of the information, in compliance with section XI, Declaration of Rights, Florida Constitution, was a harmless error.

The Attorney General argues the petitioner was not entitled to a copy of the information, *Because*, petitioner pleaded not guilty to the charges, and understood said charges, and did in fact defend against said charges. We find the Attorney General arguing the framers of the Florida Constitution did not intend for a defendant to be furnished a copy of the information, when they said, "*And shall be furnished with a copy of the Indictment against him.*" If the defendant pleads not guilty, or knows what he is charged with, or defends against the charge. Such reasoning is unheard of, especially by a scholar of the law. The Declaration of Rights Section XI, doesn't say you waive your rights if you defend or know what you are charged with. The Attorney General argues the State of [fol. 60] Florida can violate one of the most indispensable parts of Due Process of Law, and then call it harmless error. I ask this Honorable Court, this question. If a defendant failed to give *Notice of Appeal*, would the defendant be allowed to Appeal? Certainly not, because law has rules of procedure that must be complied with. And when one side violates those rules it becomes an illegal procedure.

The United States Supreme Court said in, "Twining v. New Jersey, 211 U.S. 78, that Due Notice was an indispensable part of Due Process of Law. Yet the Attorney General of Florida, says it is only harmless error. This Honorable Court has also held in "Lee v. State, 155 So. 123, that Due Notice was one of the requirements demanded by the constitutions, yet the Attorney General of Florida,

says it would be harmless error to disregard what the *Constitution Commands.* This Court said in "Messer v. State, 120 Fla. 95, that no intentional or unintentional frittering away of the Constitutional privileges should be tolerated. Therefore the right to be furnished a copy of the information, being a *Constitutional Right,* it is a burden upon this Court to uphold this right. The Attorney General has tried to make excuses for not furnishing the petitioner with a copy of the information. I am sure this Honorable Court will agree, that of all human inventions, the most worthless is an excuse.

The information charges petitioner with assault to murder in the first degree, one Alex Scurry, the transcript of [fol. 61] testimony shows there was testimony interduced by the State concerning other crimes not charged in the information, of which the petitioner was not on trial for. Such testimony was very prejudiced toward the defendant, and would seriously damage the petitioner in the eyes of the jury. On page (6) of the trial transcript, State witness Alex Scurry, said "I didn't even see the boy that got shot until it was all over there," On page (13) of the transcript State witness George Fields said, "And so I brought him across the street to where Ellix Scurry was and noticed this other boy was shot in the front of the leg. And I demanded somebody to take him to the hospital immediately" On page (14) of the trial transcrip. we find Officer Fields still testifying under the directions and leading questions of the County Solicitor, "A. He said I'm sorry I shot the other boy; I intended to kill Scurry, and I'll still get him," "Q What Scurry was he talking about? A. Well, Both the Brothers; he didn't like the way he was treated in the place. Q. Well, now, this other fellow that was shot there that night, was he shot pretty bad? A. Pretty bad. I believe he was in the hospital about three days; the front of his leg was shot."

On page (4) of the transcript the testimony shows the witness Alex Scurry claims the petitioner tried to kill him at his place of business known as the Blue Chip in Lake Wales. And the information charges such. Now who was the boy that was shot? Why didn't the County Solicitor charge the petitioner with that crime? If the petitioner shot the *boy.* It should be remembered the witness Scurry said he *was not shot.* That the petitioner hit him with his

[fol. 62] fist in the Blue Chip, and that the petitioner did not have a gun.

Next we find on page (14) of the transcript, State witness Officer Fields said. "A. I think so. There was four shots at *Liges* that night; and when he finished, this one, I understand, was shot pretty bad. And then we got a call there was *three other's shot.*"

Who are all these people that got shot? And where is *Lige's?* is it in Polk County? Why didn't the County Solicitor charge the petitioner with these crimes in the information, and name the people that got shot.

It seems the petiti-oner and the complaining witness had a fist fight, and later the petitioner discharged a shot gun in the vicinity of the Blue Chip, and the witness Scurry decided he would say the petitioner shot at him. And the County Solicitor introduced evidence of all the shootings that happened around Polk County, Florida, and by doing so he would prejudice the Jury toward the petitioner to the extent they would convict the petitioner, for a crime that really didn't happen.

This record supports this fact, because witness Scurry said the petitioner shot point blank at him from a distance of 14 feet with a shot gun and did not hit him.

This record shows on page (22) the petitioner was an expert marksman with fire arms, that he (petitioner) spent 6 years in the army as a sharp shooter, and had training in the use of shotguns. Therefore, it is not unreasonable to assume that if petitioner intended to shoot the witness Scurry he would have hit him.

[fol. 63] Such a conviction as this well not stand, because the State had no right to bring up crimes not shown in the information. It is plain the Solicitor and trial Judge was taking advantage of the petitioner's lack of knowledge of how to defend himself and the trial Judge would not appoint counsel to defend petitioner. Such procedure violates the rule laid down by the United States Supreme Court in 337 U.S. at 381.

And this Honorable Court has just been reversed by the United States Supreme Court, in "Cash v. Culver, because the State allowed testimony about other crimes not charged in the information. (Where the defendant did not know how to defend against such evidence) Justice Steward, said in "Cash v. Culver, "The problems which this testimony

raised were thus beyond the kin of a layman, and it was clearly the kind of testimony that could seriously damage a defendant in the eyes of a Jury".

There is no dispute between the record and these facts, because the record clearly shows such testimony went before the Jury. With the sanctions of Judge Roy H. Amidon. Petitioner will rely on the opinion handed down by the U.S. Supreme Court in Cash v. Culver, to support his views on this point.

This record shows the day this so called crime was committed the petitioner was released from the Sympathetic Ward at Bay Pines, See, page 30 of the transcript. The Government had the petitioner locked up in a mental ward for the past six months See page (22) of trial transcript.

The petitioner showed the trial Judge, statements from Doctors to support that fact. (T.R. (22). The Judge ruled the statements was inadmissible, (TR) (22). Judge Amidon [fol. 64] said petitioner could put the Doctor on the stand and have him testify. (TR)(22).

This record shows this is just another one of Judge Amidon's trials where he utilized dictorial criminal procedure and punishment to make a scapegoat of the weak.

Any competent trial Judge, would have appointed counsel, under the circumstances of his case. And then counsel would have obtained a mental examination of the petitioner's state of mind to see if he was fit to stand trial, surely he was not able to defend himself on the facts, disclosed. This would of been possible under Section 917.02 Appointment of Expert Witnesses to examine petitioner. Or under Chapter 394.

Florida law provides ample procedure for the guidance of the trial Court, and in this instance it was not used.

The duty of the Court was to protect this petitioner's rights, and the trial Court lost jurisdiction, in not appointing counsel to defend this petitioner. The record speaks for itself. See Uveges v. Penn. 355 U.S. 437, 441. Also See Gibbs v. Burke, 337 U.S. 773. Rice v. Olson, 324 U.S. 786. Townsend v. Burke, 334, U.S. 736. Also See Zellers v. State, 189 So. 236, 138 Fla. 158. Also See Sneed v. Mayo, 66 So. 2 D, 865.

The Attorney General has come before this Court and argued the record reflects the trial Judge scrupulously pro-

tected the rights of the petitioner. Such argument is an insult to the intelligence of the Justices of this Honorable Court, and the Attorney General, argues the petitioner effectively represented himself to the end that a verdict for a lesser offense was returned.

[fol. 65] The record shows the petitioner ask three questions, and one of the three was not ask proper. See page (9) of the trial transcript. This record shows the petitioner was an ignorant tongue tied defendant that did not know Court procedure, See Page (31) of trial transcript. The petitioner could not talk to the Jury, and did not. And did not cross-examine the State Witnesses.

This Court can see what Judge Roy H. Amidon, said to this ignorant mentally unbalanced negro man, on page (31) of trial transcript.

Such a Judge, cannot be respected or respect himself that will set and hear such a trial. See Betts v. Brady, 316 U.S. 463, 62 Sup. Ct. 1257.

No selfrespecting Judge would entertain to try a man who has shown evidence of prior or present insanity. Without following the proper procedure provided by the State for such defendant's. The Jury was entitled to all the facts.

Wherefore, the writ of Habeas Corpus as prayed for should be granted and petitioner discharged from this unlawful custody, on the proof that the trial Court lost Jurisdiction in the proceedings above.

Petitioner shall ever pray, humbly.

S Elijah McNeal, Jr., Box 221, Raiford, Florida.
62823.

Certificate of Service (Omitted in Printing)

[fol. 66] IN THE SUPREME COURT OF FLORIDA, JANUARY TERM, A.D. 1959

Case No. 29,750

ELIJAH MCNEAL, JR., Petitioner,

vs.

R. O. CULVER, as State Prison Custodian, Respondent

OPINION—Filed July 1, 1959

A case of original jurisdiction—Habeas Corpus.

Elijah McNeal, Jr., in Proper Person, Petitioner.

Richard W. Ervin, Attorney General and Odis M. Henderson, Assistant Attorney General, for Respondent.

THOMAS, C.J.:

Upon the representation of the petitioner that he was denied the services of an attorney when he was placed on trial for assault with intent to commit murder in the first degree and was refused a copy of the information charging him with that offense, the court issued a writ of habeas corpus directing the respondent to make a proper return.

The matter is now ready for disposition on the writ and the answer of the respondent, prison custodian, that the petitioner is held under a commitment issued 1 April 1958 by the Judge of the Criminal Court of Record for Polk County, Florida, ordering him safely to keep and confine the [fol. 67] petitioner for 20 years. Made a part of the return is a photostatic copy of the testimony produced at the trial and parts of the record necessary to an understanding of the procedure such as the minutes showing arraignment and judgment of the court.

Nothing whatever appears in this record of the trial to show whether or not any request was made of the trial judge to appoint counsel to aid the petitioner in his defense. No obligation is put upon a trial judge by statute to appoint an attorney for an accused except in capital cases. Sec. 909.21, Florida Statutes 1955, and F.S.A.; Johnson v. Mayo, 158 Fla. 264, 28 So. 2d 585, cert. denied, 329 U.S. 804, 67 S. Ct. 492, 91 L.Ed. 687; Johnson v. Mayo, Fla. 40 So. 2d 134, and no absolute responsibility rested on the

judge trying the case to inquire about the wish of the defendant to have the services of legal counsel, Bute v. Illinois, 333 U.S. 640, 644, 68 S. Ct. 763, 92 L.Ed. 986, although we have recognized the practice of asking a defendant whether or not he desired a lawyer and of providing one if that was his wish. Sneed v. Mayo, Fla., 66 So. 2d 865.

Not only was there a lack of evidence in the record indicating that the petitioner was unable to defend himself but circumstances are reflected showing that we should indulge the presumption that the contrary was the case. The charge was simple and so was the evidence introduced to support it.

After the petitioner had an altercation with the proprietor in an establishment that appears to have been a 'jook', called the "Blue Chip", he withdrew to his quarters, and, more effectively to renew the feud, reappeared armed with a shotgun loaded with fine shot. When he was within range of his late adversary he fired missing his target and wounding four other persons. His aim was wretched despite six years service in the army where, he says, he became a sharpshooter.

At the time of his trial he was 29 years of age.

So it cannot accurately be said that the issues were so complex, or the petitioner was so young, ignorant and in-[fol. 68] experienced, as to bring into play the exception to the rule requiring appointment of counsel only in capital cases and to require further inquiry into the procedure culminating in his conviction and sentence. Rice v. Olson, 324 U.S. 786, 65 S. Ct. 989, 89 L.Ed. 1367; Uveges v. Pennsylvania, 335 U.S. 437, 69 S. Ct. 184, 93 L.Ed. 127; Sneed v. Mayo, supra; Butler v. Culver, opinion filed 17 April 1959.

The petitioner next badly stated that he was denied a copy of the information but there is nothing in the record from which it could even be inferred that this right guaranteed him by Sec. 11 of the Declaration of Rights of the Constitution of Florida was violated. There it is provided that "[i]n all criminal prosecutions, the accused shall * * * be furnished with a copy of the indictment against him." Unquestionably it is the duty of a trial court to be sure that in every instance this copy of the formal accusation be given to the defendant. Should failure to observe the mandate in the Declaration occur, the defendant can demand compliance, Sec. 906.28, Florida Statutes 1957, although the

duty is primarily one of the court. And it would probably be wise for the court minutes to show in each instance that such a copy had been delivered.

This right, however, is one that may be waived, Howard v. State, 146 Ala. 149, 41 So. 301. We presume that in the instant case the court performed the duty placed upon it by the Constitution. Even without this presumption the petitioner cannot prevail on this tack. He was arraigned and plead not guilty; more than a month later, 26 February 1958, he was convicted, incidentally of a lesser offense than the one charged. On 31 March 1958 sentence was pronounced. One year later, lacking 10 days, he protested in his petition for habeas corpus that he had not received the copy of the information to which he was entitled. These circumstances demonstrate that he waived any right he had to a copy of the information even if one was not given him.

After careful consideration we conclude that the writ should be discharged and the petitioner remanded to custody of the respondent.

TERRELL, HOBSON, THORNAL and O'CONNELL, JJ., concur.

[fol. 69] CLERK'S CERTIFICATE TO FOREGOING TRANSCRIPT
(Omitted in Printing)

[fol. 70] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1959

No. 319, Misc.

ELIJAH McNEAL, JR., Petitioner,

vs.

R. O. CULVER, as State Prison Custodian

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI —March 7, ~~1959~~ 1960

On petition for writ of Certiorari to the Supreme Court of the State of Florida.

On consideration of the motion for leave to proceed herein *in Forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted, and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 765.

March 7, 1960.

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